
in the
Supreme Court
of the
United States

OCTOBER TERM, 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory

process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandem* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

REPLY ARGUMENT

Certain over-selectivity in quoting portions of the trial proceedings below, the mislabeling of the Reible brothers as "fugitives" when in law and fact they were not, together with the government's ignoring the constitutional aspects of the two questions herein presented by the Petitioner, Goldstein, render essential the filing of this Reply Brief pursuant to Rule 24(4), Rules of the *United States Supreme Court*.

A. THE PETITIONER'S FIRST QUESTION PRESENTED.

1. The Fugitive Concept.

The often-seen prosecutorial comments to the contrary notwithstanding the brothers Reible were not and are not "fugitives," rendering the more vulnerable the government's opposition to their depositions. A "fugitive" is defined in Black's Law Dictionary, 4th Edition (1951) as:

"One who flees; always used in law with the implication of a flight, evasion or escape from some duty or penalty or from the consequences of a misdeed."

The term "fugitive from justice" at *Id.*, at page 800, is further defined:

"A person who, having committed a crime, flees from jurisdiction of Court where crime was committed or departs from his usual place of abode and conceals himself within the district. (citations omitted)"

The foregoing definition contains the following footnote:

"To be regarded as a 'fugitive from justice,' it is not necessary that one shall have left the state, for the very purpose of avoiding prosecution; it being sufficient that, having committed there an act constituting a crime, he afterwards has departed from its jurisdiction, and when sought to be prosecuted is found in another state. (citations omitted)

No matter for what purpose or with what motive for under what belief, he leaves the state, and even though at time of leaving he had no belief he had violated criminal laws and did not contemplate fleeing from justice to avoid prosecution for crime with which he is charged. (citation omitted)"

No interpretation of the incontrovertible facts at bar, however attenuated, justifies labeling the brothers Reible as fugitives. The brothers singularly or jointly, did not depart from the jurisdiction of the United States, the government's case amply demonstrated that whatever the Reible brothers did, inculpatory or otherwise, was effected in Europe. (See Tr.—Generally.) The government, moreover, conceded in its *Response to Defendant's Goldstein Motion to Recess Trial and Obtain Depositions*, that the Brothers were "German Nationals . . . who could not have arrest warrants served on them due to the lack of this Court's jurisdiction Germany where they reside." The government, therefore, (a) knew where the brothers resided, (b) knew that they did not secrete themselves, (c) even had received correspondence from the Reible brothers requesting a copy of the indictment, and (d) indicated that they would be dismissing the Reibles as defendants in the indictment. (See *2d Supp. Appendix, App.3.*)

But more important were the Petitioner's motion to depose the brothers, the government's opposition thereto and the trial and appellate courts' prevention of those depositions and its corresponding effect on the Petitioner's presenting all evidence "otherwise available" to him relative to the one remaining count of an original forty-two (42) indictment.

2. The Petitioner's Trial [Rule 15(a)] Motion To Depose The Brothers Reible

The government's Brief in Opposition, page 12, seriously misstates the facts when it labels the Petitioner's Trial Motion to Depose the Reible brothers as a motion to recess the trial. The motion (R. 418-422) clearly expressed Petitioner's need for the specialized exculpatory testimony of the brothers, their willingness and availability to be deposed in the Bahamas and suggested that "the deposition can take place on Saturday or Sunday of this forthcoming week and thereupon, not unduly delay the trial of this cause." The motion further "suggested" that an expedited transcript can be made available for reading to the jury on Monday. (See also, App.F., Supp.App.2-3)

The qualities of the motion vis-a-vis interrupting the trial proceedings, therefore, could not logically or intelligently be described as disruptive or burdensome. The normal weekend interruption of the trial proceedings also would have witnessed the satisfaction of the Petitioner's exculpatory evidentiary requirements.

Secondly, the government contributed to the delay in seeking the brothers' deposition, a further example of the unilateral, manipulative capacity of the prosecution which deprived the Petitioner from effectively marshalling and

presenting their exculpatory testimony in his defense. Prior to trial, the government announced that it was considering "dismissing" the Reibles from the indictment. (2d.Supp.Appendix,App.4) No further action was effected but at the commencement of trial, the brothers remained charged defendants, thus disabling the Petitioner from calling them as defense witnesses. When the trial's evidence unfolded focusing the government's attention to the Petitioner's alleged stock ownership in NUSI, and his alleged but unfounded control of the NUSI bank account, the importance of the Reibles' testimony contradicting such crystalized. Either one or both of the foregoing factors were unanswered by the government's Brief in Opposition.

3. The Constitutional Objections Unanswered.

Also unanswered in the Brief in Opposition are the strenuously urged constitutional objections made by the Petitioner: The automatic exclusion of willing but unavailable co-indictees from Rule 15, *supra* depositions contravening the Sixth Amendment's right to compulsory process over witnesses and unreasonable distinguishing between co-indictees who submit to prosecution and offer exculpatory testimony in behalf of a co-defendant. See *Byrd v. Wainwright*, *United States v. Echeles*, and *United States v. Shuford*, all *op.cit.* Petitioner's original petition.

B. THE PETITIONER'S SECOND QUESTION PRESENTED

1. The posture of the Record.

The government's characterization of the irrefutable posture of the trial proceedings is incorrect and ignores the very portion of the prosecutor's summation which

specifically and personally articulates the Petitioner by name when commenting on his failure to testify or explain the evidentiary deficiencies in his case. Omitted from the Brief of Opposition is the following:

"Did Goldstein say, Hey, stop, no more sales? Did he say, 'Let's freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund shareholders?' No, he did not do that. (T. 122)

... Mr. Goldstein is trying to say that he is so naive. . . . (T. 1.67)

Now, what did Mr. Goldstein and the others do. Well they didn't tell Reigler. (T.1.69)

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being fraud. (T.1.69)

There is no evidence in this case, one way or the other, as to who had the power to sign the checks on NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to the money that was in that account." (T.1.128) (emphasis added)

This emphasized portion of the argument does not reference that which the Petitioner is alleged to have done or omitted doing during the course of alleged conspiracy. It is a comment on the Petitioner's defenses *urged at the trial*, thus falling within the ambit of conduct proscribed by this Court in *Griffin v. California, op. cit.*

2. The (In-Tandum) Argument.

The government's Brief also ignores the *in tandem* effect of the government's unilateral, unbridled control over the status of the Reible brothers as "indicted co-defendants" depriving the Petitioner of the very witnesses who could exculpate him and thereafter directly commenting on his *personal failure* to explain the evidentiary deficiencies in his case.¹

¹Indeed the government's closing remarks at (T1.128):

"There is no evidence in this case, one way or the other, as to who had the power to sign the checks on this NUSI account at the Swiss bank corporation and there is no evidence in this case one way or the other as to what happened to the money that was in that account. . . ."

Could never be interpreted as a "direct and proper response to (Petitioner's) argument." (Brief in Opposition, pg. 15), since the remarks contravene the government's stipulation in which it conceded that only the Reible brothers were authorized signatories on the NUSI account at the Swiss bank corporation.

CONCLUSION

Unanswered is the question of the degree of discretion and manipulation this Court will allow the government to posture the defense's ability to procure the testimony of willing but unavailable defense witnesses through Rule 15(a), *supra* depositions. To date, that discretion is unbridled and, as evidenced herein, abusive. Also, unanswered is the tolerance to be afforded the government to both manipulate that evidence otherwise available to a defendant, and then comment in summation on the deficiencies in his or the "defense's" evidence. The government's Brief in Opposition has ignored these questions but they are certainly worthy of this Court's full consideration. The writ of certiorari herein sought should be granted by this Court.

Respectfully Submitted,

HIGHSMITH, STRAUSS
& VARNER, P.A.

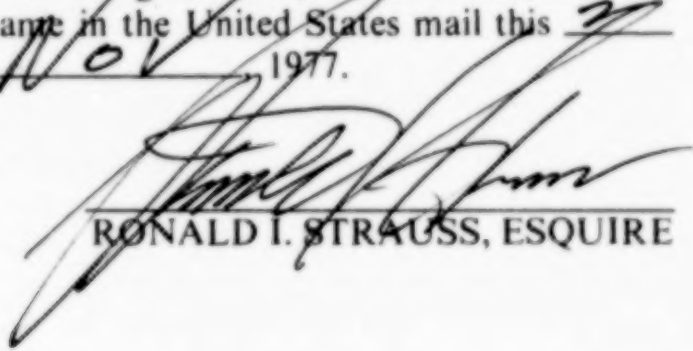
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petitioner's Reply to Brief in Opposition were served on: WADE H. MCCREE, JR., (4 Copies), Solicitor General of the United States, United States Department of Justice, Washington, D.C., 20530, ROBERT LEE GUTHRIE, Atty. for Petitioner Nikoloric, 1410 Republic National Bank Building, Dallas, Texas, 75201; THEODORE KLEIN, ESQUIRE, Atty. for Petitioner Dearden, Jr., 2401 Douglas Road, Coral Gables, Florida, by depositing same in the United States mail this Nov day of 7, 1977.


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